seeking to purchase a residence in a CIC with CC&Rs containing this language, even if he or she is aware of the terms of the CC&Rs applicable to the subdivision, cannot know when the property is purchased whether an antenna will or will not be approved.

43. Therefore, Amateur Radio is indeed being subjected to "death by a thousand cuts." The Commission and the United States Congress has repeatedly noted the value of the Amateur Radio Service and the Commission long ago declared a "strong Federal interest" in the ability of licensees to conduct Amateur Radio communications. The Commission has acknowledged that "an outdoor antenna of some type is a necessary component for most types of Amateur Radio communications." *Amateur Radio Preemption,* 14 FCC Rcd. at 19413 (1985). To date, however, the Commission has allowed its more than 750,000 licensees to be precluded completely from providing Amateur Radio public service communications by means of preclusive private land use regulations, and the situation is worsening exponentially and constantly. Relief is necessary now.

IV. The Commission Has Confirmed that it Has Authority to Limit Private Land Use Regulations Where There is a Direct Conflict with Federal Telecommunications Policy.

44. The Commission in 1985 issued a declaratory ruling, subsequently codified, which addressed the conflicts between State and local land use regulations and the maintenance and use of outdoor Amateur Radio antennas in residential areas.[33] That declaratory ruling enunciated an eminently workable, limited preemption policy of "reasonable accommodation" by which the Commission struck a balance between legitimate local land use regulations and the important Federal interest in promoting and protecting Amateur Radio public service and emergency communications. The policy applied to the regulation of amateur radio communications by states and municipal governments. It addressed prohibitions or unreasonably restrictive structural

[33] The Commission acknowledged in 1985 that an outdoor antenna of some type is a necessary component for most types of Amateur Radio communications. *Amateur Radio Preemption,* 14 FCC Rcd. at 19413 (1985).

limitations imposed by non-federal, governmental entities. *Amateur Radio Preemption*, 101 FCC 2d 952 (1985); *codified at* 47 C.F.R. Section 97.15(b). The declaratory ruling is often referred to as "PRB-1", the docket number associated by the Commission's then Private Radio Bureau for the notice and comment proceeding that led to the issuance of the ruling.

45. Following receipt of notice and comment, in September of 1985 the Commission issued *Amateur Radio Preemption*. In its declaratory ruling, the Commission stated, in relevant part:

* * * * * *

> ...we recognize here that there are certain general state and local interests which may, in their even-handed applications, legitimately affect amateur radio facilities. Nonetheless, there is also a strong federal interest in promoting amateur communications. Evidence of the interest may be found in the comprehensive set of rules that the Commission has adopted to regulate the amateur service. Those rules set forth procedures for the licensing of stations and operators, frequency allocations, technical standards which amateur radio equipment must meet and operating practices which amateur operators must follow. We recognize the amateur radio service as a voluntary, noncommercial communication service, particularly with respect to providing emergency communications. Moreover, the amateur radio service provides a reservoir of trained operators, technicians and electronic experts who can be called on in times of national or local emergencies. By its nature, the Amateur Radio Service also provides the opportunity for individual operators to further international goodwill. Upon weighing these interests, we believe a limited preemption policy is warranted. *State and local regulations that operate to preclude amateur communications in their communities are in direct conflict with federal objectives and must be preempted.*
>
> ...Because amateur station communications are only as effective as the antennas employed, antenna height restrictions directly affect the effectiveness of amateur communications. Some amateur antenna configurations require more substantial installations that others if they are to provide the amateur operators with the communications he/she desires to engage in. For example, an antenna array for international amateur communications will differ from an antenna used to contact other amateur operators at shorter distances...*[L]ocal regulations which involve placement, screening, or height of antennas based on health, safety, or aesthetic considerations must be crafted to accommodate reasonably amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose.*
>
> (*Id.*, at 959-60) (citations omitted; emphasis added)

46. The Commission had noted the assumption in earlier court decisions of an apparent absence of intent on the part of the Federal government to preempt amateur antenna regulation, and consequently clarified its position on the matter. The Commission preempted local regulation of Amateur Radio antennas, to the extent that local regulations preclude, or do not reasonably accommodate Amateur communications; or which do not represent the minimum practicable regulation to accomplish the local authority's legitimate purpose. It is apparent that effective Amateur communications require antennas to be erected in clear space, at heights and configurations reflecting the type of communications to be conducted and the path lengths typically used, relative to the surrounding terrain.

47. Following the release of *Amateur Radio Preemption, supra*, the initial question which faced the courts was whether such an action was within the FCC's authority, and whether that authority was reasonably exercised. A series of cases following *Amateur Radio Preemption* uniformly held that the preemption policy was a proper exercise of the Commission's authority.[34] Court decisions on the subject have held without exception that local restrictions on amateur antennas that constitute effective prohibitions on communications and/or which involve fixed, arbitrary limitations are facially void as preempted.[35]

48. In September of 1989, the Commission revised its Amateur Radio Service rules to codify at 47 C.F.R. § 97.15(b) the essential holding of *Amateur Radio Preemption*, as follows:

---

[34] See, e.g., *Thernes v. City of Lakeside Park, Kentucky, et al.*, 779 F. 2d 1187, 59 Pike and Fischer Radio Regulation 2nd Series 1306 (6th Circuit, 1986); *on remand*, 62 Pike and Fischer Radio Regulation 2nd Series 284 (E.D. Kentucky, 1986); *Bodony v. Incorporated Village of Sands Point, et al.*, 681 F. Supp. 1009, 64 Pike and Fischer Radio Regulation 2nd Series 307 (E.D. NY, 1987); *Bulchis v. City of Edmonds*, 671 F. Supp. 1270 (W.D. Wash, 1987); *Izzo v. Borough of River Edge, et al.*, 843 F.2d 765 (3d Cir., 1988) (holding that the FCC's preemption order "infuses into the proceeding a federal concern, a factor which distinguishes the case from a routine land use dispute having no such dimension." The Court recognized that "(b)ecause the effectiveness of radio communication depends on the height of antennas, local regulation of those structures could pose a direct conflict with federal objectives").

[35] See, *Evans v. Board of Commissioners*, 752 F. Supp. 973, (D. Colo. 1990); *MacMillan v. City of Rocky River*, 748 F. Supp. 1241 (N.D. Ohio, 1990); *Pentel v. City of Mendota Heights*, 13 F. 3d 1261 (8th Cir., 1994).

> (b) Except as otherwise provided herein, a station antenna structure may be erected at heights and dimensions sufficient to accommodate amateur service communications. [State and local regulation of a station antenna structure must not preclude amateur service communications. Rather, it must reasonably accommodate such communications and must constitute the minimum practicable regulation to accomplish the state or local authority's legitimate purpose. See, PRB-1, 101 FCC 2d 952 (1985) for details.]

The policy is a three-part test for the legitimacy of State and municipal regulations which affect Amateur Radio communications. First, State and local regulations that operate to preclude Amateur communications in their communities are in direct conflict with Federal objectives and must be preempted. Second, local regulations which involve placement, screening or height of Amateur Radio antennas based on health, safety or aesthetic considerations must be crafted to accommodate reasonably Amateur Radio communications. Third, local regulations must represent the "minimum practicable" regulation to accomplish the local authority's legitimate purpose. *Amateur Radio Preemption, supra*, 101 FCC 2d at 960. This policy has worked well since 1985, *in the circumstances to which it applies*. It does not entitle a radio Amateur to install in residential areas any antenna he or she wishes to install. The three-part test for local regulations leaves wide leeway for municipal land use regulators acting in good faith to regulate the aesthetics and the safety aspects of Amateur Radio antenna installations. The flexibility of the "no prohibition", "reasonable accommodation" and "minimum practicable regulation" tests for local land use regulations provided a means (which proved workable) for Amateur Radio licensees and municipal land use regulators to work together to reach compromise and agreement on the structuring of ordinances, special use permits, building regulations, and the like. It has been a great success overall, and it has fostered and promoted Amateur Radio emergency communications preparedness by virtue of the ability of licensed radio Amateurs to operate from

their residences. It also fosters international goodwill, and it permits young people who become interested in Amateur Radio to participate in their educational avocation without unnecessary constraint. Their Amateur Radio communications are protected against unreasonable municipal land use regulations.

49. Yet, since 1985 and to the present time, the Commission has drawn an incorrect distinction between State and municipal restrictions on Amateur Radio communications on the one hand, and private land use regulations on the other; and it has repeatedly declined to preempt or limit the latter. In *Amateur Radio Preemption*, at ¶ 7, the Commission stated that: "Since...restrictive covenants are contractual agreements between private parties, they are not generally a matter of concern to the Commission." In footnote 6 of ¶ 25 of *Amateur Radio Preemption*, the Commission reiterated, but did not explain, its terse holding: "We reiterate that our ruling herein does not reach restrictive covenants in private contractual agreements. Such agreements are voluntarily entered into by the buyer or tenant (sic) when the agreement is executed and do not usually concern this Commission." *The premise of the Commission in creating a dichotomy between governmental land use regulation of Amateur Radio communications and private land use regulation of those same antennas was then and is now an absolute fallacy*: the Commission assumed that CC&Rs were private contractual agreements between buyers and sellers of land that were in some way negotiable.[36] The contractual characteristic of private land use regulation has not existed in the United States for a great many years, as discussed above. The terms of CC&Rs are <u>not</u> negotiable between sellers and buyers of

[36] Even if private land use regulations *were* a matter of arms-length negotiation between buyers and sellers of land (which they most assuredly are not), the Commission never explained in *Amateur Radio Preemption* why that fact would negate the "strong Federal interest" in promoting amateur communications, "particularly with respect to providing emergency communications" so it was unclear why the Commission was unconcerned about the ability of radio Amateurs to provide those communications simply because the radio Amateur happened to live in a CIC. Amateur Radio communications that are precluded by virtue of municipal land use regulations are contrary to Federal telecommunications policy to the exact same extent as those communications that are precluded by private land use regulations.

land. Declarations of CC&Rs are in place on a comprehensive basis long before a buyer of land comes to the table. CC&Rs which preclude or severely limit Amateur Radio antennas and communications are ubiquitous and prevalent, and they are increasing as fast as are CICs. There is no meeting of the minds between an Amateur Radio licensee buyer and his or her seller when purchasing land in a CIC. The private land use restrictions are already in place and are binding on the buyer of residential real property, and the only issue is whether or not the buyer has the flexibility to live elsewhere. In many, if not most cases, and increasingly, the purchase of land by an Amateur Radio licensee in a CC&R-restricted community is a *fait accompli*. He or she must live in a particular area due to career or family exigencies, and the ability to purchase property suitable to the person's needs which is not within a CIC is diminishing. A person's life decisions cannot be altered in most cases based on the ability or inability to erect an antenna, and as discussed above, in many cases at the time a residence is purchased, the buyer cannot know whether or not he or she will be able to erect and maintain an Amateur Radio antenna anyway. Furthermore, the logic of the different treatment fails: It does not matter one whit whether an Amateur Radio operator is prohibited from installing and maintaining at his or her residence an effective outdoor antenna: the effect is precisely the same either way, and the Commission's finding long ago that there is a "strong Federal interest" in effective Amateur Radio communications is frustrated, regardless of the type of land use restriction that precludes those communications.

50. The Commission's 1985 finding that CC&Rs were a matter of private agreement and therefore did not "concern" the Commission could only have been realistically premised on a jurisdictional determination; i.e. that the Commission did not have authority over purely private contractual agreements. Otherwise, it is inexplicable that the Commission would not have any

"concern" that private land use restrictions would preclude Amateur Radio communications entirely; or that they would fail to reasonably accommodate Amateur Radio communications; or that the CC&Rs might not constitute the "minimum practicable regulation" in order to accomplish whatever the legitimate purpose of the CC&Rs might be. It cannot logically be the case that the Commission has no interest in protecting an Amateur Station's ability to prepare for or provide public service or emergency communications in a private land use regulated community but it does have an interest in protecting that same station from unreasonable State or municipal land use regulations which have the same effect[37], *unless* (1) the Commission, in 1985, believed that it did not have the jurisdiction to preempt private land use regulations, or else (2) it believed that the decision to purchase property in a CIC and hence to accept the terms of the CC&Rs was voluntary on the part of the radio Amateur.

51. It is clear today that the decision to live in a CIC is not often voluntary, given the prevalence of CICs and of the accompanying CC&Rs which prohibit or severely restrict antennas (or which subject a licensee to a decisionmaking process that is without specified standards, and which is completely beyond his or her control or ability to influence). And it became clear in 1996 that the Commission has ample jurisdiction to preempt any private land use regulations which frustrate Federal telecommunications policy.

52. In 1996, Congress passed the *Telecommunications Act of 1996* [38] which was an omnibus telecommunications reform Bill. At Section 207 thereof, entitled *Restrictions on Over-The-Air Reception Devices*, the Commission was ordered, within 180 days of enactment of the legislation to promulgate (pursuant to Section 303 of the Communications Act of 1934)

---

[37] It is true *a priori* that private land use regulations which preclude or fail to reasonably accommodate Amateur Radio communications, or which do not constitute the minimum practicable regulation to accomplish the goal of the private regulations are just as inconsistent with the strong Federal interest in Amateur Radio communications as are zoning regulations of those same facilities which do not meet the same test.

[38] Public Law 104-104, 110 Stat.56 (1996).

regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services (known now as over-the-air television reception devices, or "OTARDs"). Congress instructed the Commission to extend this prohibition to nongovernmental restrictions such as "restrictive covenants and encumbrances." [39] Pursuant to this legislation, the Commission commenced a rulemaking proceeding which resulted[40] in the adoption of Section 1.4000 of the Commission's rules.[41] That rule invalidated restrictions, including private covenants, homeowners' association rules or similar restrictions on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership interest in the property, that impairs the installation, maintenance or use of an antenna for the reception of direct broadcast satellite service one meter or less in diameter or in Alaska; an antenna designed to receive video programming via multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services which are one meter or less in diameter or diagonal measurement; or an antenna that is designed to receive television broadcast signals.[42] The legislation was later extended to preclude such restrictions on wireless broadband devices.

53. In adopting Section 1.4000, the Commission found specifically that it has jurisdiction

---

[39] See, House Report No. 204, 104th Congress, 1st Session, at 124 (1995).
[40] *In re Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*; 11 FCC Rcd. 19276 (1996).
[41] 47 C.F.R. § 1.4000 (1996).
[42] Notably, there are no size limitations specified with respect to over-the-air television broadcast receive antennas. Some are very large; larger than many Amateur Radio HF, VHF and UHF antennas and arrays.

to prohibit unreasonable private land use restrictions pertaining to telecommunications facilities.

The Commission stated[43] as follows:

> The government may abrogate restrictive covenants that interfere with federal objectives enunciated in a regulation. In *Seniors Civil Liberties Ass'n v. Kemp* (citation omitted) the District Court found no taking in an implementation of the Fair Housing Amendments Act (FHAA) that declared unlawful age-based restrictive covenants, thereby abrogating the homeowner's association's rules requiring that at least one resident of each home be at least 55 years of age. The court found that the FHAA provisions nullifying the restrictive covenants constituted a "public program adjusting the benefits of economic life to promote the common good", and not a taking subject to compensation (footnote omitted). Similarly, the Commission's rule implementing Section 207 promotes the common good by advancing a legitimate federal interest in ensuring access to communications (footnote omitted) and therefore justifies prohibition of nongovernmental restrictions that impair such access.
>
> ...Some commenters also challenge our authority to prohibit these restrictions under the Commerce Clause. The Supreme Court has made it clear that Congress not only can supersede local regulation, but also can change contractual relationships between private parties through the exercise of its constitutional powers, including the Commerce Clause. U.S. Const. art. I, §8, cl.3. In *Connolly v. Pension Benefit Guaranty Corp.* (citation omitted) the Court stated,
>
> Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights in property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.
>
> If a regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions. For the same reason, the fact that legislation disregards or destroys existing contractual rights, does not always transform the regulation into an illegal taking.
>
> Moreover, in *FCC v. Florida Power Corp.* [480 U.S. 245 (1987)] the Court permitted the Commission to invalidate certain terms of private contracts relating to property rights....Courts have also found that homeowner covenants do not enjoy special immunity from federal power (citations omitted). Thus, we conclude that the authority bestowed upon the Commission to adopt a rule that prohibits restrictive covenants or other similar nongovernmental restrictions is not constitutionally infirm.

---

[43] Op. Cit., *In re Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*; 11 FCC Rcd. 19276 (1996).

> ...In proposing a strict preemption of such private restrictions without a specific rebuttal or waiver provision (footnote omitted), we noted that nongovernmental restrictions appear to be related primarily to aesthetic concerns. We tentatively concluded that it was therefore appropriate to accord them less deference than local governmental regulations that can be based on health and safety considerations...

Thus, finding that it had jurisdiction to limit private land use regulations, and finding that private land use regulations are entitled to less deference than are municipal land use regulations because the former principally deal with aesthetics, the Commission decided to apply to private land use regulations the same rule and procedures applicable to government regulations of these same OTARD facilities where the property subject to the private regulations is under the exclusive use or control of the antenna user and the user has a direct or indirect ownership interest in the property.

54. The parallel between the OTARD policy and the relationship between Amateur Radio licensees and homeowners' associations or other enforcers of private land use regulations is obvious. The Commission has for 33 years maintained that there is a strong Federal interest in effective Amateur Radio communications and that municipal land use regulations which preclude or fail to make reasonable accommodation for Amateur Radio communications are preempted. Since those municipal land use regulations are entitled to more deference from the Commission than are private land use regulations; since an outdoor antenna is a necessary component of an effective Amateur Radio station; since the Commission has found that it has the jurisdiction to preempt private land use regulations where they conflict with Federal telecommunications policy; and since limits of the application of private land use regulations which, on their face or as applied do not permit the installation and maintenance of an effective outdoor antenna are obviously contrary to the same strong Federal interest in effective Amateur

Radio communications, the path that the Commission should take in this case is clear: a policy entitling Amateur Radio operators to an effective outdoor antenna in every case is called for. Reasonable conditions and prior approval of an HOA are not inconsistent with that entitlement.

55. Notwithstanding the findings of the Commission in 1996 with respect to Federal jurisdiction over private land use regulations which interfere with Federal telecommunications policy, the Commission declined in 1999 to extend its *Amateur Radio Preemption* policy to private land use regulations. ARRL had asked the Commission in a Petition for Rule Making filed February 7, 1996 (RM-8763) to clarify several aspects of its *Amateur Radio Preemption* policy, including extending the "no prohibition, reasonable accommodation, and least practicable regulation" three-part test to private land use regulations. ARRL's premise was that the Commission's finding in 1985 that private land use regulations did not "concern" the Commission was based on jurisdictional considerations, and the jurisdictional issue had been squarely resolved in favor of FCC jurisdiction in the OTARD proceeding. In fact (as quoted *infra*) the Commission had specifically determined in that proceeding that *private land use regulations were entitled to less, not more, deference than governmental land use regulations which interfere with Federal telecommunications policy*. Nevertheless, the (then) Deputy Chief, Wireless Telecommunications Bureau, in a tersely worded *Order* released under delegated authority November 19, 1999,[44] declined to extend the *Amateur Radio Preemption* policy to

[44] *Modification and Clarification of Policies and Procedures Governing Siting and Maintenance of Amateur Radio Antenna and Support Structures, and Amendment of Section 97.15 of the Commission's Rules Governing the Amateur Radio Service,* DA 99-2569 (WTB rel. November 19, 1999); *affirmed with modifications by Order on Reconsideration*, 15 FCC Rcd. 22151 (Deputy Chief, WTB, 2000*); review denied by Memorandum Opinion and Order*, FCC 01-372 (December 26, 2001). In the Order on Reconsideration, the Deputy Chief, WTB, attempted to distinguish the OTARD policy from the *Amateur Radio Preemption* policy by arguing that OTARD antennas are relatively small, and Amateur Radio antennas can be very large in some installations. The Deputy Chief cited for that incorrect and unsupported premise an unusually large "moonbounce" antenna array located in a very rural area of Texas unburdened by CC&Rs as an example of the difference in antenna size. The logic of the Deputy Chief, WTB in that *Order on Reconsideration* was faulty in several major respects. First of all, the OTARD preemption policy was, and Section 1.4000 of the Commission's rules is, far more restrictive and limiting of a CIC's jurisdiction than is *Amateur*

CC&Rs. [45] However, the Commission did "strongly encourage" CICs to apply the "no prohibition, reasonable accommodation, and least practicable regulation" three-part test to private land use regulation of Amateur radio antennas:

> Notwithstanding the clear policy statement that was set forth in PRB-1 excluding restrictive covenants in private contractual agreements as being outside the reach of our limited preemption (citation to *Amateur Radio Preemption* omitted) we nevertheless strongly encourage associations of homeowners and private contracting parties to follow the principle of reasonable accommodation and to apply it to any and all instances of amateur service communications where they may be involved.
>
> *Order,* DA 99-2569 at ¶ 6

This admonition neither had nor could have had any effect on the consistent prohibitions of Amateur Radio antennas.[46] In fact, the situation has developed precisely contrary to the Commission's admonition: since 1999, as is noted above, the number of CICs has radically increased and the ability of a licensed Amateur Radio operator to install and maintain any

---

Radio Preemption. The OTARD rule intrudes significantly on both municipal and private land use jurisdiction, and does so pursuant to a clearly articulated Congressional goal, which is the protection of competition among commercial video delivery systems and services. There has never been a suggestion that the OTARD policy, or any similar restrictive preemption policy should be applicable to Amateur Radio antennas in CICs, so the comparison by the Deputy Chief, WTB at the time was a comparison of "apples and oranges." Second, the relief requested herein in Appendix A is far less intrusive with respect to HOA jurisdiction than is the OTARD policy. See *infra.*

[45] ARRL had argued in RM-8763, among other things, that the judicial enforcement of CC&Rs constituted "state action" and that therefore, "private" land use regulations were of necessity subject to the same limitations as are governmental land use regulations. Neither the Deputy Chief, WTB nor the Commission ever addressed that argument. In the November 19, 1999 *Order* in RM-8763, the Deputy Chief, WTB stated that, since the Commission's policy on private land use regulations was "clear" it was unnecessary for the Commission to determine whether or not judicial enforcement of covenants constitutes "state action". Such a finding, which has been made in several judicial decisions, e.g. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Park Redlands Covenant Control Committee v. Simon*, 181 Cal. App. 3d 87 (1986); *Ross v. Hatfield,* 640 F. Supp. 708 (D.C. Kansas, 1986); would subject otherwise purely private conduct to the constitutional limitations applicable to government action. However, it certainly was not "unnecessary" for the Commission to make that determination. The Commission in fact could not have reasonably dismissed ARRL's Petition *without* making that determination, since its premise for the dismissal of the Petition was (the erroneous view) that CC&R regulation of antennas was a matter of purely private agreement.

[46] The admonition does, however, establish that the Commission's *intention* is, and has been, for its *Amateur Radio Preemption* policy of no prohibition, reasonable accommodation and least practicable regulation to accomplish a legitimate interest of the regulator to apply to all types of land use regulation of Amateur Radio antennas. The only other question, therefore, is whether the Commission has the jurisdiction to apply its policy to private as well as governmental land use regulations. That question is now beyond any doubt answered in the affirmative.

effective Amateur Radio antenna from a residence has been substantially diminished or precluded entirely in entire planned cities.

56. ARRL did not in 1985, when the Commission issued its *Amateur Radio Preemption* declaratory ruling, challenge the Commission's uneven handling of State and local versus private land use regulations. It was apparent at the time that the Commission's statement that it did not have an "interest" in private land use regulations assumed a lack of jurisdiction. That is the only explanation for why it did not, despite its very specific finding at the time of a "strong Federal interest in promoting Amateur Radio communications," apply its flexible, no preclusion, reasonable accommodation, least practicable regulation policy equally to *all* types of land use regulations. After the 1996 Telecommunications Act's directive to preempt all regulation of OTARD devices by municipal or private land use authorities, however, and the Commission's finding that it did have jurisdiction to regulate or even preempt private land use regulations, and that it was appropriate to accord them *less deference than local governmental regulations*, ARRL asked the Commission in 1999 to apply the 1985 *Amateur Radio Preemption* policy to all types of land use regulations. The Commission, in response, said in 1999, 2000 and 2001 that it preferred to have guidance from Congress in order to do that. The Commission's 2012 in the Report to Congress, DA 12-1342, released August 20, 2012[47] noted that, *absent guidance from*

[47] Section 6414 of the *Middle Class Tax Relief and Job Creation Act of 2012*, Public Law 112-96, called on the Commission, in consultation with the Office of Emergency Communications of the Department of Homeland Security, to complete a study on "the uses and capabilities of Amateur Radio Service communications in emergencies and disaster relief;" and to submit to the Committee on Energy and Commerce of the House of Representatives and to the Committee on Commerce, Science and Transportation of the Senate a report on the findings of such study. To be included in the Study were: (1) a review of the importance of emergency Amateur Radio service communications relating to disasters, severe weather, and other threats to lives and property in the United States; (2) recommendations for enhancement in the voluntary deployment of amateur radio operators in disaster and emergency communications and disaster relief efforts; (3) the improved integration of Amateur Radio operators in the planning and furtherance of initiatives of the Federal government; (4) an identification of impediments to enhanced Amateur Radio Service communications, such as the effects of unreasonable or unnecessary private land use restrictions on residential antenna installations; and (5) recommendations regarding the removal of such impediments. The Commission, in response to this legislation, issued a *Public Notice,* (DA 12-523) on April 2, 2012 seeking public comments on the uses and capabilities of Amateur Radio Service communications

Congress, there was "no compelling reason" to "revisit the Commission's previous determinations that preemption should not be expanded to CC&Rs" (covenants, conditions and restrictions). But it nevertheless reiterated in the report that should Congress provide such guidance, the Commission would act immediately (consistent with its prior urging that HOAs apply a "no preclusion, reasonable accommodation, least practicable regulation" policy on their own initiative).

V. Congress, ARRL and CAI Have Provided Ample Guidance to the Commission, Establishing a Bright Line Test for Private Land Use Regulations to Support a Sustainable Amateur Radio Service and to Protect the Legitimate Interests of HOAs.

57. Following the Commission's directive to seek Congressional guidance relative to the preclusive effect of private land use regulations on Amateur Radio operators, ARRL consulted with members of the House Energy and Commerce Committee and with the Senate Commerce Committee, and in June of 2013, toward the end of the 113th Congress, Representatives Adam

---

in emergencies and disaster relief; on the importance to the United States of emergency Amateur Radio Service communications; and on impediments to enhanced Amateur Radio Service emergency communications. The Commission released its *Report* on Amateur Radio emergency communications and impediments thereto to Congress and to the public on August 20, 2012. The Report was not what was called for by Section 6414 of the Middle Class Tax Relief and Job Creation Act of 2012 in several respects. It did not include an independent evaluation of the subjects required by the legislation to be studied. Instead, it was in effect a summary of the public comments received. However, The FCC did conclude, among other things, that:

> The responses to the *Public Notice* indicated agreement between the Amateur Radio community and public safety community as to the utility of amateur radio in emergency response situations. Amateur radio communications are suited to disaster response in a way that many more advanced forms of communication today are not, thereby allowing it to supplement other emergency communications activities during disasters.
> *****
> Additionally, because amateur radio networks are typically spread across wide geographical areas, they have the ability to spread critical disaster-related information to areas far from the disaster area. Because they can utilize different frequency bands and emission types, amateur radio networks can operate under a wide variety of conditions. The flexibility and geographical dispersion of amateur radio networks provide advantages for relaying information out of localized disaster zones and into outside jurisdictions coordinating recovery efforts.

The Commission did not question any of the showings made with respect to the profound crippling effect of CC&Rs on Amateur Radio emergency communications. However, on the subject of preemption of private land use regulations, FCC concluded that it did not intend on its own initiative to revisit the issue of private land use regulations. Rather, it reiterated that it is willing to act swiftly to provide relief to Amateur Radio operators from private land use regulations, should Congress provide guidance in the area.

Kinzinger of Illinois and Joe Courtney of Connecticut introduced a bipartisan Bill, H.R. 4969, the Amateur Radio Parity Act of 2014. That Bill called on the Commission to amend its Section 97.15(b) regulations concerning the height and dimensions of station antenna structures to prohibit a private land use restriction from applying to amateur service communications if the restriction precludes such communications, fails to accommodate such communications, or does not constitute the minimum practicable restriction on such communications to accomplish the legitimate purpose of the private entity seeking to enforce such restriction. Effectively, it asked that the Commission extend the essential holding of *Amateur Radio Preemption* to both State and local land use regulations and private land use regulations affecting Amateur Radio communications. The Bill was popular on a bipartisan basis and in the few months prior to Congress' adjournment in 2014 the Bill garnered 69 cosponsors. The Bill would not have imposed significant restrictions on HOAs or CICs. The premise was that the Commission had in place a workable policy which balanced local land use considerations, and the strong Federal interest in effective Amateur Radio communications. The policy should be applicable to <u>*all*</u> types of land use regulations which preclude, fail to reasonably accommodate, or do not constitute the minimum practicable regulation of Amateur Radio stations consistent with the land use authority's legitimate purpose. The uniform application of this policy is consistent with established Congressional policy that "reasonable accommodation should be made for the effective operation of Amateur Radio from residences, private vehicles and public areas, and that regulation at all levels of government should facilitate and encourage amateur radio operation as a public benefit." Public Law 103-408.

58. Early in the 114th Congress, the same Bill was introduced March 4, 2015 as H.R. 1301 by Representatives Kinzinger and Courtney. A companion Bill S.1685, was introduced in

the Senate on June 25, 2015 by Senators Roger Wicker of Mississippi and Richard Blumenthal of Connecticut. The House Bill ultimately garnered significant bipartisan support with 126 cosponsors. However, it also brought statements of concern from the Community Associations Institute, with respect to the lack of specificity of the "reasonable accommodation" requirement. The staff of the House Subcommittee on Communications and Technology, wishing to resolve these concerns, brought ARRL and CAI representatives together to work cooperatively to resolve CAI's concerns. The result of that effort was a slightly revised Bill which more precisely enunciated the relationship between a HOA and a licensed radio Amateur residing in a community regulated by the HOA. H.R. 1301 was amended such that it directed the Commission to amend its station antenna structure regulations to prohibit a private land use restriction from applying to amateur radio stations if the restriction: (1) precludes communications in the Amateur Radio Service; (2) fails to permit a licensee of Amateur Radio Service to install and maintain an effective outdoor antenna on property under its exclusive use or control, or (3) is not the minimum practicable restriction to accomplish the lawful purposes of a community association seeking to enforce the restriction. Before installing an outdoor antenna, however, the amended H.R. 1301[48] provided that an amateur radio licensee must obtain a community

[48] The operative language of H.R. 1301 read as follows:

> Not later than 120 days after the date of the enactment of this Act, the Federal Communications Commission shall amend section 97.15 of title 47, Code of Federal Regulations, by adding a new paragraph that prohibits the application to amateur stations of any private land use restriction, including a restrictive covenant, that—
> (1) on its face or as applied, precludes communications in an amateur radio service;
> (2) fails to permit a licensee in an amateur radio service to install and maintain an effective outdoor antenna on property under the exclusive use or control of the licensee; or
> (3) does not constitute the minimum practicable restriction on such communications to accomplish the lawful purposes of a community association seeking to enforce such restriction.
> (b) Additional Requirements.—In amending its rules as required by subsection (a), the Commission shall—
> (1) require any licensee in an amateur radio service to notify and obtain prior approval from a community association concerning installation of an outdoor antenna;

association's prior approval. A community association[49] may: (1) prohibit installations on common property not under the exclusive control of the licensee, and (2) establish installation rules for amateur radio antennas and support structures.

59. The premises for the legislation stated in the Bill were several. The Bill stated Congressional findings as follows:

> (1) More than 730,000 radio amateurs in the United States are licensed by the Federal Communications Commission in the amateur radio services.
>
> (2) Amateur radio, at no cost to taxpayers, provides a fertile ground for technical self-training in modern telecommunications, electronics technology, and emergency communications techniques and protocols.
>
> (3) There is a strong Federal interest in the effective performance of amateur stations established at the residences of licensees. Such stations have been shown to be frequently and increasingly precluded by unreasonable private land use restrictions, including restrictive covenants.
>
> (4) Federal Communications Commission regulations have for three decades prohibited the application to stations in the amateur service of State and local regulations that preclude or fail to reasonably accommodate amateur service communications, or that do not constitute the minimum practicable regulation to accomplish a legitimate State or local purpose. Commission policy has been and is to require States and localities to permit erection of a station antenna structure at heights and dimensions sufficient to accommodate amateur service communications.

> (2) permit a community association to prohibit installation of any antenna or antenna support structure by a licensee in an amateur radio service on common property not under the exclusive use or control of the licensee; and
> (3) subject to the standards specified in paragraphs (1) and (2) of subsection (a), permit a community association to establish reasonable written rules concerning height, location, size, and aesthetic impact of, and installation requirements for, outdoor antennas and support structures for the purpose of conducting communications in the amateur radio services.

[49] The definition of "community association" in the Bill was as follows:

> The term "community association" means any non-profit mandatory membership organization composed of owners of real estate described in a declaration of covenants or created pursuant to a covenant or other applicable law with respect to which a person, by virtue of the person's ownership of or interest in a unit or parcel, is obligated to pay for a share of real estate taxes, insurance premiums, maintenance, improvement, services, or other expenses related to common elements, other units, or any other real estate other than the unit or parcel described in the declaration.

(5) The Commission has sought guidance and direction from Congress with respect to the application of the Commission's limited preemption policy regarding amateur service communications to private land use restrictions, including restrictive covenants.

(6) There are aesthetic and common property considerations that are uniquely applicable to private land use regulations and the community associations obligated to enforce covenants, conditions, and restrictions in deed-restricted communities. These considerations are dissimilar to those applicable to State law and local ordinances regulating the same residential amateur radio facilities.

(7) In recognition of these considerations, a separate Federal policy than exists at section 97.15(b) of title 47, Code of Federal Regulations, is warranted concerning amateur service communications in deed-restricted communities.

(8) Community associations should fairly administer private land use regulations in the interest of their communities, while nevertheless permitting the installation and maintenance of effective outdoor amateur radio antennas. There exist antenna designs and installations that can be consistent with the aesthetics and physical characteristics of land and structures in community associations while accommodating communications in the amateur radio services.

There is also included in the Bill text language that disassociates the provisions of the Bill pertaining only to private land use regulations from the Commission's *Amateur Radio Preemption* policy, 47 C.F.R. §97.15(b) such that the regulation, which now pertains only to State and municipal regulation of Amateur Radio communications, (1) is independent from the provisions to be applied to private land use regulations; and (2) is unchanged by the provisions dealing with private land use regulations.

60. The result of the negotiations that led to the meeting of the minds between ARRL and CAI was that the support for the amended H.R. 1301by both parties was memorialized in correspondence from each party addressed to Representative Greg Walden, then Chair of the House Subcommittee on Communications and Technology. The Bill as amended passed in the House of Representatives unanimously in September of 2016. S. 1685, which had been

considered by and which was approved by the Senate Commerce Committee, was not amended and was not further considered by the Senate. The Senate did not act on H.R. 1301 before the end of the 114th Congress. However, there was only one Senator, Bill Nelson (D-Florida), who registered any concern about the Parity Act provisions and there were four cosponsors of the Senate Bill.

61. Immediately upon the commencement of the 115th Congress, on January 13, 2017, H.R. 555, the Amateur Radio Parity Act of 2017 (which was identical to the version of H.R. 1301 that had passed the House in 2016 was introduced, again by Representatives Kinzinger and Courtney). The Bill passed unanimously again, this time four days after being introduced. A Senate companion Bill was introduced by Senators Wicker and Blumenthal on July 12, 2017. Senator Nelson of Florida continued to oppose the Senate Bill but his view was unique. Twice more during the current Congress, the current Parity Act language was passed by the House, once as a component of the National Defense Authorization Act (NDAA) and more recently as part of the FY 2018 Financial Services and General Government (FSGG) appropriations legislation that is still pending. Therefore, the Parity Act language that resulted from extensive negotiations between ARRL and CAI has been passed by the House without objection *four different times* in the past two years, and three times in the current Congress.

62. Clearly, the House of Representatives (acting on a completely bipartisan basis), ARRL, and CAI have all agreed upon a "bright line" test to distinguish between unreasonable private land use restrictions from those which are reasonable. Those private land use regulations (or the application of them) which prohibit, preclude or fail to permit the installation and maintenance of effective, outdoor Amateur Radio antennas; and those which do not constitute the minimum practicable regulation to accomplish the CIC's (principally aesthetic) legitimate

goals are precluded. Meanwhile, Amateur Radio antenna installations are not entitled to be installed in common areas,[50] and HOAs are entitled to require prior approval of each antenna installation[51] and to enact reasonable regulations governing the installations. What is reasonable differs depending on the residential circumstances of the licensee. The application of the HOA's regulations must be evaluated on a case-by-case basis. An HOA might well require single family homeowners within a planned subdivision to locate an Amateur Radio antenna at a location which will be least obtrusive from surrounding parcels or from public rights-of-way.[52] However, the owner of a cooperative or condominium in a multiple unit dwelling may not be able to install a permanent outdoor antenna, but might be able to erect a temporary antenna on a patio, balcony or deck, for example, when the licensed Amateur station is in use. Some form of Amateur Radio operation using an effective outdoor antenna must be facilitated from the licensee's residence in order for the cadre of trained operators to continue to be ready, willing and able to provide communications immediately when called upon to do so, on a uniform basis. HOA regulation of Amateur Radio antenna installations cannot be arbitrary. For example, an Amateur Radio operator who moves to a suburban community in, for example, Northern Virginia who can erect and maintain on a rooftop a television broadcast receive antenna atop her or his roof of any size or configuration pursuant to the OTARD rules should also be permitted to erect an Amateur Radio antenna of the same general size and configuration at the same residence.

---

[50] Even the OTARD rules do not currently require that owners of residences in multiple-unit dwellings be given access to common areas for antenna installations. See, 47 C.F.R. § 1.4000(a)(1) (areas for OTARD antenna installation must be under the "exclusive use and control" of the property owner).

[51] Similar to the building permit requirement for municipal land use approval of antennas, it is not unreasonable to require radio Amateurs to obtain prior approval of the HOA before a new installation commences after the effective date of this regulation. However, the HOA is subject to the overarching requirement that it must permit an effective outdoor antenna in all cases, and the prior approval requirement would necessitate that the HOA's governing documents enable such a requirement in the first place. The HOA cannot have any more authority than what it is accorded by the Declaration of Covenants under any circumstances.

[52] However, as the Commission has noted in the past, imposition of excessive costs or burdens on an applicant for an Amateur Radio antenna authorization (such as a complete vegetative screening requirement) can constitute a *de facto* prohibition; it cannot be said to be a reasonable accommodation; and it cannot be said to constitute the minimum practicable regulation to accomplish even an aesthetic objective.

63. The path forward furnished by this legislation; the overwhelming support for it in both the House and Senate; and the complete accord that has been reached between ARRL (as the national association for Amateur Radio) and CAI, (the only national association representing the interests of homeowners' associations in the United States) has provided the level of guidance that the Commission has been seeking with respect to achieving a balance between the strong Federal interest in Amateur Radio communications and the interests of CICs and communities regulated by private land use regulations. The rules proposed in the attached Appendix are indeed balanced and reflect the understandings reached in the legislative process over the past five years. The Commission should enact these rules which necessarily prohibit the application to Amateur Radio stations of deed restrictions which preclude Amateur Radio communications. Those deed restrictions which do not permit an Amateur Radio operator living in a deed-restricted community to install and maintain an effective outdoor antenna on property under the exclusive use or control of the licensee should be prohibited; as should those restrictions which do not impose the minimum practicable restriction on Amateur communications to accomplish the lawful purposes of an HOA seeking to enforce the restriction. Yet, Amateurs who wish to install an antenna in a deed restricted community where there is an HOA may (if the HOA's governing documents permit such), notify and obtain prior approval of the HOA. HOAs can preclude Amateur antennas in common areas (property not under the exclusive use of the licensee). If their governing documents permit it, HOAs can enact reasonable written rules governing height, location, size and aesthetic impact of, and new installation requirements for, outdoor antennas and support structures for amateur communications. This regulation is and is intended to be prospective only, and is not applicable to antennas installed prior to the effective date of the regulation.

VI. Conclusions.

64. Radio Amateurs provide, on a volunteer basis, public service, emergency and disaster relief communications using radio stations located in their residences. Their volunteer service costs taxpayers nothing. Reliable communications are provided at no cost to any served agency or to any government entity. FEMA has stated that when Amateur Radio operators are needed in an emergency or disaster, they are <u>really</u> needed. Congress has many times favorably cited the Amateur Radio Service as a model of public responsiveness and volunteerism. Agencies served by Amateur Radio include the American Red Cross, the Salvation Army, the Federal Emergency Management Agency, the Department of Defense and each and every state office of emergency services. Disaster relief planning exercises and emergency communications certification courses guarantee trained operators throughout the United States, located within and outside disaster relief areas. Amateur Radio also provides an opportunity for STEM education in experiential learning programs and technical self-training by licensees which is of immense value. Finally, it provides ample opportunities for international goodwill, cultural learning and positive social connections.

65. Land use restrictions that prohibit the installation of outdoor Amateur Radio antenna systems are the largest threat to Amateur Radio communications. Private land use regulations are escalating quickly and exponentially. An outdoor antenna is critical to the effectiveness of an Amateur Radio station. Typically, all Amateur Radio antennas are prohibited in residential areas by private land use regulations. In other instances, prior approval of the homeowners' association is required for any outdoor antenna installation, but there are no standards governing the homeowners' association's approval process and almost always, approval requests are denied.

66. Thirty-three years ago, the Commission held that there was a "strong Federal interest" in effective and reliable Amateur Radio communications. The Commission also found that zoning ordinances often unreasonably restricted Amateur Radio antennas in residential areas. In a docket proceeding referred to as "PRB-1" the Commission created a three-part test for municipal regulations affecting Amateur Radio communications. State or local land use regulations: (a) cannot preclude Amateur Radio communications; (b) must make "reasonable accommodation" for Amateur Radio communications; and (c) must constitute the "minimum practicable restriction" in order to accomplish a legitimate municipal purpose. See, 47 C.F.R. §97.15(b). The FCC did not extend this policy to private land use regulations at the time, assuming that they were merely private agreements between buyers and sellers of land. However, in implementing the Telecommunications Act of 1996, the Commission found that: (a) it does have jurisdiction to preempt private land use regulations that conflict with Federal policy; and (b) that private land use regulations are entitled to less deference than municipal regulations because the former are premised solely on aesthetic considerations, rather than safety issues, whereas municipal regulations are concerned with both. In response to ARRL's repeated requests that the Commission apply its *Amateur Radio Preemption* policy equally to all types of land use regulations which unreasonably restrict or preclude volunteer, public service communications, the Commission said that it would do so upon receiving some guidance from Congress in this area.

67. The United States Congress has overwhelmingly and consistently supported the Amateur Radio Parity Act, upon which the instant Petition is based, for the past five years. The House has passed the legislation on four different occasions, including three times during this current session of Congress. This is bipartisan legislation that costs the Federal government

nothing at all. It is now time for actual and functional parity in the Commission's regulations in order to protect the strong Federal interest in Amateur Radio communications. The rule in the attached Appendix, which incorporates all of the elements of the Parity Act legislation, is a balanced provision that would protect both the entitlement of Amateur Radio volunteers to be able to utilize their FCC-issued licenses to provide emergency, disaster relief and public service communications, while at the same time protecting the aesthetic concerns and the jurisdiction of homeowners' associations. The language has the support of both ARRL and the Community Associations Institute (CAI) which is the national association of homeowners' associations. ARRL and CAI have cooperatively and carefully negotiated the provisions of the Bill, and both organizations have stated their support for those provisions. The language in the attached appendix for the regulation implementing the Bill language is consistent with the provisions of the Bill.

Therefore, the foregoing considered, ARRL, the national association for Amateur Radio, respectfully requests that the Commission issue a Notice of Proposed Rule Making at an early

date, proposing to adopt the language set forth in the attached Appendix and to modify Section 97.15 of the Amateur Service Rules to include the language set forth therein.

Respectfully submitted,

ARRL, THE NATIONAL ASSOCIATION FOR AMATEUR RADIO

225 Main Street
Newington, CT 06111

By: *Christopher D. Imlay*
Christopher D. Imlay
Its General Counsel

BOOTH, FRERET & IMLAY, LLC
14356 Cape May Road
Silver Spring, MD 20904-6011
(301) 384-5525

December 18, 2018

APPENDIX A

Section 97.15 of the Commission's rules, which currently reads as follows:

§ 97.15 Station antenna structures.

(a) Owners of certain antenna structures more than 60.96 meters (200 feet) above ground level at the site or located near or at a public use airport must notify the Federal Aviation Administration and register with the Commission as required by part 17 of this chapter.

(b) Except as otherwise provided herein, a station antenna structure may be erected at heights and dimensions sufficient to accommodate amateur service communications. (State and local regulation of a station antenna structure must not preclude amateur service communications. Rather, it must reasonably accommodate such communications and must constitute the minimum practicable regulation to accomplish the state or local authority's legitimate purpose. See PRB-1, 101 FCC 2d 952 (1985) for details.)

(c) Antennas used to transmit in the 2200 m and 630 m bands must not exceed 60 meters in height above ground level.

Would be amended to read as follows:

§ 97.15 Station antenna structures.

(a) Owners of certain antenna structures more than 60.96 meters (200 feet) above ground level at the site or located near or at a public use airport must notify the Federal Aviation Administration and register with the Commission as required by part 17 of this chapter.

(b) Except as otherwise provided herein, a station antenna structure may be erected at heights and dimensions sufficient to accommodate amateur service communications. (State and local regulation of a station antenna structure must not preclude amateur service communications. Rather, it must reasonably accommodate such communications and must constitute the minimum practicable regulation to accomplish the state or local authority's legitimate purpose. See PRB-1, 101 FCC 2d 952 (1985) for details.)

(c) Any private land use restriction, including restrictive covenants and regulations imposed by a community association, that on its face or as applied

(1) precludes or fails to permit amateur service communications; (2) fails to permit a licensee to install and maintain an effective outdoor antenna capable of operation on all amateur radio frequency bands, on property under the exclusive use or control of the licensee; or (3) which does not constitute the minimum practicable restriction on such communications to accomplish the lawful purposes specifically articulated in the declaration of covenants of a community association seeking to enforce such restriction, is prohibited and may not be enforced.

Subject to the foregoing, and with respect to antennas first installed after the effective date hereof, a community association (if so empowered by the declaration of covenants) may (a) require an amateur radio licensee to obtain approval from the association of a proposed antenna before initial installation; (b) prohibit the installation of an antenna or antenna support structure by a licensee on common property not under the exclusive use or control of the licensee; and (c) establish reasonable written rules concerning height, location, size, and aesthetic impact of, and installation requirements for, effective outdoor antennas and support structures for the purpose of conducting communications in the amateur radio service.

(See *Private Land Use Regulations Concerning Amateur Radio Antenna Structures,* Report and Order, _____ FCC Rcd. _____(201_) for details).

(d) Antennas used to transmit in the 2200 m and 630 m bands must not exceed 60 meters in height above ground level.